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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

# No. 887

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GERALD DAVID HUDSON, *Petitioner*

*v.*

UNITED STATES OF AMERICA, *Respondent*

□

**Petition for Writ of Certiorari**
**to the United States Circuit Court of Appeals**
**for the Tenth Circuit**

HAYDEN C. COVINGTON
*Counsel for Petitioner*

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## Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Tenth Circuit

TO THE SUPREME COURT OF THE UNITED STATES:

Gerald David Hudson, petitions this court for a writ of certiorari. He shows unto the court as follows:

1. *Opinion of the court below.*

The opinion of the United States Circuit Court of Appeals is reported at 157 F. 2d 782. It appears in the record, [83-85]*

2. *Jurisdiction.*

The Jurisdiction of this court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules XI and XIII of the Criminal Appeals Rules promulgated by this court on May 7, 1934.

* Bracketed figures appearing in this petition refer to pages of printed transcript of record.

3. *Timeliness of this petition.*

The judgment of affirmance was rendered and entered October 22, 1946. [85-86] Time to file a petition for rehearing was enlarged to November 9, 1946. [86] The petition for rehearing was filed November 6, 1946. [94] The petition was denied November 20, 1946. [95] Upon application duly made the time for filing petition for writ of certiorari was enlarged to and including January 18, 1946. The petition for writ of certiorari is filed within the enlarged time.

4. *Statutes and Regulations involved.*

Sections 3 (a), 5 (d), 10 (a) and 11 of the Selective Training and Service Act of 1940, as amended (50 U. S. C. App. 301-318) are drawn in question here, as well as Sections 622.44, 623.1, 623.2, 627.24 and 629 of the Selective Service Regulations (32 C. F. R. 601.5 *et seq.*) promulgated by the President under said Act.

5. *Questions presented.*

The principal question presented is whether a minister of religion, classified as liable for training and service in the armed forces, who refuses to report for induction, after having his acceptability determined upon a preinduction physical examination, is entitled to challenge the order to report for induction in defense against a criminal prosecution under the Act, based on his refusal to report. In other words, did the courts below err in holding, as a matter of law, that petitioner could not challenge the draft board order because he had not reported for induction?

That is to say, did the courts below commit fundamental error in holding that the decision of *Falbo* v. *United States* (320 U. S. 549), rather than that of *Estep* v. *United States* (327 U. S. 114) applied?

Did the courts below err in holding, as a matter of law, that the determination of the administrative agency on

whether petitioner was exempt from training and service as a minister of religion, was not a matter for the determination of the court or jury in defense to the indictment charging petitioner with defiance of the order to report for induction?

The following subsidiary question arises only if the principal question is answered in the negative: Did the issuance of the order to report for induction more than ninety days after preinduction physical examination, which was contrary to the Regulations, make the order null and void so as to excuse petitioner from reporting as ordered?

## Statement of Case

### Form of Action

This criminal action was instituted in the District Court of the United States for the District of Kansas, Third Division, by return of an indictment charging petitioner with violation of the Selective Training and Service Act of 1940, as amended, and the Regulations thereunder. [1-2]

The indictment charged that petitioner, a registrant classified for training and service in the armed forces, "did then and there unlawfully, willfully, knowingly, and feloniously fail and neglect to report to said Local Board at the time and place so designated in said order." [2]

Thereafter petitioner pleaded "not guilty". [4] The trial to a jury before the court was waived. [5, 9] The Government presented its case to the court and rested, whereupon petitioner moved for an instructed verdict. [17-21] At the close of all the evidence, petitioner moved for a judgment of acquittal and again his motion was denied, with exception to him. [39-40] The court rendered its verdict of guilty on March 12, 1946. [40] Judgment was promptly pronounced thereon. [9]

Petitioner moved for a new trial, but his motion was overruled, with exception. [10-11]

Petitioner duly served and filed his written notice of appeal in the time and manner required by law. [12-14]

After the case was lodged in the United States Court of Appeals, the cause was duly submitted on September 9, 1946. [43] On October 22, 1946, the court held that the judgment should be affirmed upon the authority of *Falbo* v. *United States,* 320 U. S. 549, and that *Estep* v. *United States,* 327 U. S. 114, did not apply. [83-85] The judgment of affirmance was duly entered. [85-86]

## Facts

Hudson, now 21 years of age, registered under the Selective Training and Service Act of 1940, on September 16, 1943, with Crawford County Local Board No. 1, at Girard, Kansas. [17-18] He was thereupon assigned order number 11607 by said board. [53] He timely filed a Selective Service Questionnaire on October 11, 1943, answering all the questions required of him. [55-82] In Series VIII he stated that he was a minister of religion, did customarily serve as a minister and had been a minister of Jehovah's witnesses since August 16, 1942. [65] In the questionnaire he claimed classification of IV-D exempting him as a minister of religion under Section 5 (d) of the Act. [67] Supporting his claim he filed with the board written proof as to his ministerial work. [79-81]

Also filed by Hudson was a Special Form for Conscientious Objector, properly filled out, which contained additional evidence as to his training for the ministry and activity as a minister. [44-54]

A number of persons testified as to ministerial status of petitioner. [21-31] His mother testified that she had raised her son up in the nurture and admonition of the Lord to be a minister. [23-25] Lola Harris and Victor Scovell said that they recognized him as a minister because of his service and relationship to the congregation. [26-29]

There was no evidence in his file disputing the evidence and claim that he was a duly recognized minister of religion, representing a religious organization known as Jehovah's witnesses and, as its legal governing body, the Watchtower Bible and Tract Society. There was no evidence that petitioner did not fit, as a minister of religion, State Director Advice No. 213-B of National Headquarters of Selective Service System concerning the ministerial status of Jehovah's witnesses [44-82]; that he did not stand in relation to Jehovah's witnesses in the same way that the recognized orthodox clergy stand toward their congregations; that he did not perform ceremonies that are ordinarily performed by ministers of religion under the Act. This was freely admitted by the draft board officials who had handled his case. [44-82]

He was deferred because of his agricultural pursuits. [18-69] Finally the deferment was withdrawn and he was placed in Class I-A, making him liable for training and service in the armed forces, on April 4, 1945. [18, 69] On April 6, 1945, he appealed. [18] On June 8, 1945, the board of appeal denied his claim for exemption as a minister, as had the local board, and affirmed his I-A classification. [18, 69] He was duly notified by mail on June 19, 1945.

Having been previously ordered to report for preinduction physical examination and having been found physically fit for training and service [18, 69-71] he was, on July 19, 1945, ordered to report at his local board to proceed for induction on August 6, 1945. [18, 43-44, 71] Petitioner failed to report for induction as ordered. [18, 37]

## How Issues Raised

At the close of all the evidence petitioner made a formal motion for judgment of acquittal. [39] At the close of all the evidence the court found petitioner guilty. [39-40] The court held that there was nothing "in this case that brings it within the rule announced in the Estep case, which is the decision of the Supreme Court". [40]

Petitioner duly filed his motion for new trial on March 13, 1946, requesting that the judgment rendered on March 12, 1946, be set aside and a new trial ordered. [10-11] Two of the grounds of the motion were that the court erred in holding that the decision in the case of *Falbo* v. *United States, supra,* applied, rather than the decision in the case of *Estep* v. *United States, supra.* [10-11] The motion for new trial was overruled, with exception to petitioner. [12]

The court below, in its opinion affirming the judgment of the trial court, held that petitioner had failed to exhaust his administrative remedies and that, accordingly, the contention of petitioner that the *Estep* decision applied should be overruled and the judgment in the case affirmed under the doctrine of the *Falbo* case. [83-85]

In his petition for rehearing, petitioner renewed his contention that he was not precluded by the *Falbo* decision from challenging the draft board order because he had exhausted his administrative remedies inasmuch as he had been accepted upon a preinduction physical examination pursuant to the amendment of the Selective Training and Service Act of 1940 by Act of Congress on December 5, 1943, 50 U. S. C. App. 303, 304 (a), 57 Stat. 596, 599. [89-94] Petition for rehearing was overruled. [95]

## Specifications of Error

The Circuit Court of Appeals for the Tenth Circuit erred—

(1) in affirming the judgment of conviction;

(2) in failing to order the judgment reversed and the indictment dismissed; and

(3) in failing to reverse the judgment and order a new trial.

## Reasons Relied on For Granting the Writ

The holding of the court below is in direct conflict with the holding of the Circuit Court of Appeals for the Second Circuit in *United States* v. *Balogh*, decided October 31, 1946, now pending upon petition for writ of certiorari in No. 800, October Term 1946. Moreover the holding of the court below is in direct conflict with the holding of this court on December 23, 1946, in *Dodez* v. *United States*, No. 86, October Term 1946.

In event the court holds that there is no conflict as above asserted, then petitioner says that there is presented upon this petition an important question of federal law which has not been, but which should be, settled by this court. That is, does the amendment of the Selective Training and Service Act of 1940, on December 5, 1943, and the promulgation of the regulation thereafter requiring a preinduction physical examination, entitle petitioner in this case to contend that he exhausted his administrative remedies upon the acceptance for training and service at his preinduction physical examination, and that the rule announced in *Estep* v. *United States*, No. 292 October Term 1945, and in *Dodez* v. *United States*, No. 86 October Term 1946, applies rather than the rule in *Falbo* v. *United States*, No. 73 October Term 1943?

The reasons relied on for granting the writ in this case have been exhaustively dealt with by counsel for peti-

tioner in *Cahoon* v. *United States,* No. 183 October Term 1946 (certiorari denied 67 S. Ct. 57), now pending on petition for rehearing. See the petition for writ of certiorari, pages 29-31; also petitioner's reply to the brief in opposition, pages 2-5.

Moreover counsel for petitioner and the Solicitor General have written upon this matter quite extensively in the papers filed in *United States* v. *Balogh,* No. 800 October Term 1946. See the Solicitor General's petition for writ of certiorari, pages 12-18, and respondent's memorandum in opposition, pages 1-7.

WHEREFORE, your petitioner prays that this court issue a writ of certiorari to the Circuit Court of Appeals for the Tenth Circuit directing such court to certify to this court for review and determination on a day certain to be therein specified, a full and complete transcript of the record and all proceedings in the case as numbered and entitled on the docket of said court; and petitioner further prays that the judgment of said Circuit Court of Appeals, affirming the judgment of conviction entered by the District Court, be here set aside and petitioner dismissed from custody or, in the alternative, the judgment be reversed and the cause remanded for a new trial consistent with this court's opinion; and that your petitioner be granted such other and further relief in the premises as to this court may seem just and proper in the circumstances.

GERALD DAVID HUDSON, *Petitioner*

By HAYDEN C. COVINGTON

*Counsel for Petitioner*